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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

VICTORIA WOLDRUFF,

Plaintiff and Respondent,

v.

AMER EL-ROUSAN et al.,

Defendants and Appellants.

B171782

(Los Angeles County
Super. Ct. No. BC274781)

APPEAL from a judgment of the Superior Court of Los Angeles County, Warren L. Ettinger, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgment affirmed as to Amer El-Rousan, Stimson & Gale Entertainment, Inc., Sahara Theatre III and Chuck Jajieh. Judgment reversed as to Orange Valley Entertainment, Inc. and Paradise Theatre.

Edward J. Horowitz for Defendants and Appellants Amer El-Rousan, Stimson & Gale Entertainment, Inc., Sahara Theatre III, Orange Valley Entertainment, Inc., and Paradise Theatre.

Roger Jon Diamond for Defendant and Appellant Chuck Jajieh.

Huron Maki & Johnson and Lisa L. Maki for Plaintiff and Respondent Victoria Woldruff.

Amer El-Rousan, Stimson & Gale Entertainment, Inc., Sahara Theatre III, Orange Valley Entertainment, Inc., Paradise Theatre and Chuck Jajieh (collectively, nightclubs) appeal from the judgment entered against them following a jury verdict in favor of Victoria Woldruff in her action for sexual harassment, retaliation and wrongful termination.¹ We reverse the judgment as to Orange Valley Entertainment and Paradise Theatre because no substantial evidence supports the verdicts against them. We affirm the judgment as to El-Rousan, Stimson & Gale Entertainment, Sahara Theatre III and Chuck Jajieh, rejecting their contention that the trial court erred when it declined to require Woldruff's counsel to state out of the presence of the jury whether she had received telephone calls from a witness who testified on Woldruff's behalf.

FACTUAL AND PROCEDURAL BACKGROUND

Woldruff, a former waitress at two nightclubs owned by El-Rousan, filed this lawsuit alleging she had been subjected to sexual harassment and retaliation in violation of the Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq., and had been wrongfully terminated in violation of FEHA and public policy.

According to the evidence presented at trial, El-Rousan owns Sahara Theatre III, a nightclub featuring nude dancing in the City of Industry, through his corporation Stimson & Gale Entertainment, Inc. He owned Paradise Theatre, another nightclub in the City of Industry, through his corporation Orange Valley Entertainment, until he sold both the club and the corporation in late 2000. El-Rousan testified he had no written policy or postings advising employees of their rights with respect to sexual harassment in the workplace or prohibiting either sexual harassment or retaliation against employees who complained about harassment.

¹ Although Sahara Theatre, in addition to Sahara Theatre III, is listed as a defendant-appellant in the notice of appeal, it is not named in either the special verdict or the judgment. Accordingly, we do not address any issue with respect to Sahara Theatre in this appeal. (Code Civ. Proc., § 902 [aggrieved party may appeal from judgment].)

In November 1999 Woldruff was hired as a waitress at Paradise Theatre. In January 2000 she transferred to Sahara Theatre III, where she also worked as a waitress. While working at Sahara Theatre III, Woldruff was supervised by Jajieh, who was employed by El-Rousan as the senior manager of both Sahara Theatre III and Paradise Theatre.

According to Woldruff, soon after she began working at Sahara Theatre III, Jajieh called her derogatory names, asked her to date him and made offensive sexual references to her. Jajieh also grabbed Woldruff's breasts, followed her into the women's bathroom, tried to put his hand up her skirt and pulled her close to him while she was in the club's office. Woldruff complained about Jajieh's conduct to two managers at Sahara Theatre III, including Esam Nadrous, and unsuccessfully attempted to contact El-Rousan to report Jajieh's behavior. Nadrous, who had heard Jajieh call Woldruff derogatory names and had seen Jajieh touch her in a sexually inappropriate manner, spoke to El-Rousan about Jajieh's conduct.

Shortly thereafter, Jajieh told Woldruff her work hours had been reduced. Woldruff then complained to Nadrous that she had been scheduled to work fewer hours. When Nadrous spoke to El-Rousan about the reduction in Woldruff's hours, El-Rousan told Nadrous to "'take her out of schedule'" and elaborated, "'I get sick of problems, hearing complaints about her between her and the manager Chuck [Jajieh]' and 'it's easier to replace a waitress than a manager.'" Nadrous reported to Woldruff that she had been fired by El-Rousan for complaining about Jajieh.

Jajieh denied engaging in any inappropriate behavior toward Woldruff. He admitted that El-Rousan had told him not to schedule Woldruff for work, although he said Woldruff was terminated for arguing with two other coworkers, one of whom testified she had once engaged in a verbal altercation with Woldruff.

The jury returned a special verdict, finding (1) Woldruff had been sexually harassed by Jajieh, who then improperly took punitive action against her for refusing his sexual advances; (2) El-Rousan, Stimson & Gale Entertainment, Orange Valley Entertainment, Paradise Theatre and Sahara Theatre III had created a hostile work

environment; (3) El-Rousan, Stimson & Gale Entertainment, Orange Valley Entertainment, Sahara Theatre III and Paradise Theatre had retaliated against Woldruff for reporting or protesting sexual harassment; and (4) Woldruff had been wrongfully terminated from her employment. The jury awarded Woldruff \$23,000 in economic damages and \$10,000 in noneconomic damages. The jury also found the nightclubs had acted with oppression, malice and fraud and awarded Woldruff punitive damages of \$120,000 against El-Rousan, \$30,000 against Jajieh and \$1 each against Stimson & Gale Entertainment and Orange Valley Entertainment. Judgment was entered on the jury's special verdict; and Woldruff was awarded \$100,000 in attorney fees.

CONTENTIONS

Orange Valley Entertainment and Paradise Theatre contend the judgment against them must be reversed because there was no evidence to support the jury's verdict they either created a hostile work environment or retaliated against Woldruff for reporting that she had been sexually harassed by Jajieh. The nightclubs contend that, as part of their effort to impeach Esam Nadrous, a witness who testified on Woldruff's behalf, the trial court should have required Woldruff's counsel to state out of the presence of the jury whether she had received telephone calls from Nadrous.

DISCUSSION

1. The Evidence Is Insufficient to Support the Judgment Against Orange Valley Entertainment and Paradise Theatre

In resolving challenges to a verdict based on sufficiency of the evidence, we review the record as a whole, resolving all conflicts in favor of the prevailing party and indulging all legitimate and reasonable inferences in favor of the verdict, to determine whether substantial evidence supports the verdict. (*Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) If there is substantial evidence, contradicted or uncontradicted, that will support the finding, it must be upheld regardless of whether the evidence is subject to more than one interpretation. (*Ibid.*) Substantial evidence, however, is not synonymous with "any evidence." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51.) To be substantial, the evidence supporting the judgment must be "of

ponderable legal significance, . . . reasonable, credible and of solid value.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) While the determination of the trier of fact is entitled to great weight (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259), substantial evidence “is . . . not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial.” (*Roddenberry*, at p. 652.)

The evidence does not support the jury’s findings that Orange Valley Entertainment and Paradise Theatre retaliated against Woldruff for reporting or protesting sexual harassment or subjected her to a hostile work environment.² Woldruff herself testified that all of the incidents of harassment occurred at Sahara Theatre III and that she had not been harassed while working at Paradise Theatre. She also testified she was not terminated from Paradise Theatre but instead transferred to Sahara Theatre III, where she believed she could make more money and work flexible hours. The evidence is undisputed that Orange Valley Entertainment’s only connection to the case was as the corporate owner of Paradise Theatre. Thus, no evidence suggests Orange Valley Entertainment or Paradise Theatre created a hostile work environment that affected Woldruff or in any way retaliated against her for reporting or protesting the harassment she suffered at Sahara Theatre III. Accordingly, the judgment must be reversed as to Orange Valley Entertainment and Paradise Theatre.³

2. *The Trial Court Did Not Err By Declining to Require Woldruff’s Counsel to State Out of the Presence of the Jury Whether Nadrous Had Called Her*

a. *The trial court’s rulings regarding the telephone bill and questioning Woldruff’s counsel*

² The jury awarded Woldruff \$23,000 in economic damages and \$10,000 in noneconomic damages against Orange Valley Entertainment and Paradise Theatre jointly and severally with the other defendants. The jury also awarded \$1 in punitive damages against Orange Valley Entertainment.

³ Woldruff presents no argument in her respondent’s brief to dispute the contention that the evidence is insufficient to support the judgment against Orange Valley Entertainment and Paradise Theatre.

During cross-examination of Nadrous, who testified on Woldruff's behalf, the nightclubs' counsel asked Nadrous whether he had ever called Woldruff's counsel. Nadrous responded, "Never." The nightclubs' counsel then showed Nadrous a five-page document containing Nadrous's name and address and a long list of telephone numbers, some of which counsel claimed were the cellular telephone number of Woldruff's counsel. The trial court ruled the document was inadmissible because, although it looked like a telephone bill, it had not been authenticated and its relevance had not been demonstrated. The trial court explained, "Until you've established what that piece of paper is, it does not make any difference. I can type out a list with a bunch of numbers, and put your cell phone number on it."

Subsequently, out of the presence of the jury, the nightclubs' counsel stated El-Rousan had hired an investigator to examine Nadrous's telephone records. The nightclubs' counsel argued evidence Nadrous had in fact contacted Woldruff's counsel and had lied when he testified he had never done so would buttress the nightclubs' contention that Woldruff and Nadrous had manufactured Woldruff's claim in an effort to extort money. When questioned by the trial court as to why the investigator had not testified to authenticate the alleged telephone bill, the nightclubs' counsel stated, "We frankly assume[d] [Nadrous] would acknowledge [calling Woldruff's counsel], and it would not be in dispute." The trial court reiterated its ruling that the document was inadmissible.

The nightclubs' counsel then argued that Woldruff's counsel should be required to state out of the presence of the jury whether she had received telephone calls from Nadrous. The trial court rejected this approach, finding no authority for the proposition that a party's counsel could be required to answer questions about her contact with a third-party witness. The nightclubs' counsel asked no further questions of Nadrous, nor did he call the investigator as a witness to authenticate the purported telephone bill.

b. *The nightclubs were not entitled to question Woldruff's lawyer on issues relating to the credibility of a third-party witness*

The nightclubs argue the trial court committed prejudicial error by refusing to require Woldruff's counsel to state out of the presence of the jury whether she had received telephone calls from Nadrous. They contend that, if Woldruff's counsel acknowledged Nadrous had called her, the trial court would have had a duty to inform the jury that Nadrous had lied during his cross-examination and, with this information, the jury likely would have found against Woldruff on her claims.

The nightclubs, in effect, sought to remedy their own failure to authenticate the document they claimed was Nadrous's telephone bill by conducting a brief deposition of Woldruff's lawyer. The practice of deposing opposing counsel, however, has long been discouraged because it disrupts the adversarial nature of our judicial system (*Hickman v. Taylor* (1947) 329 U.S. 495, 513 [67 S.Ct. 385, 91 L.Ed. 451]) and has the potential to create a pernicious "chilling effect" impacting truthful communications from client to attorney. (*Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1494-1495.) Given the substantial policy considerations against deposing opposing counsel, such depositions are limited to circumstances where the information is crucial to the preparation of the case, no other means exist to obtain the information other than to depose opposing counsel and the information sought is both relevant and not privileged. (*Id.* at p. 1497; see *Fireman's Fund Ins. Co. v. Superior Court* (1977) 72 Cal.App.3d 786, 790 [when allowed at all, deposing opposing counsel "should be severely restricted, and permitted only upon showing of extremely good cause"]; *Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1600.)

The nightclubs fail to satisfy the demanding criteria for questioning opposing counsel: First, obtaining the information from Woldruff's counsel would have been entirely unnecessary had the nightclubs properly authenticated the purported telephone bill. Their erroneous "assum[ption] [Nadrous] would acknowledge [calling Woldruff's counsel], and it would not be in dispute," and their failure to make any effort to remedy the gap in their proof once Nadrous denied making the calls were tactical judgments that

fall far short of demonstrating “extremely good cause.” Second, the information sought, if relevant at all,⁴ was to be used only as one of several grounds upon which the nightclubs attempted to challenge Nadrous’s credibility. Finally, questions regarding efforts made by Woldruff’s counsel to investigate her client’s case at least raise issues of privilege under the attorney-work-product doctrine. (*Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 101 [purpose of attorney-work-product doctrine is to protect the attorney in his or her efforts to prepare for trial and “the fruits of [the attorney’s] labor from discovery”].)⁵

The nightclubs’ novel theory regarding the obligations of opposing counsel and the trial court in the face of their own counsel’s failure to authenticate evidence is mistakenly premised on *United States v. LaPage* (9th Cir. 2000) 231 F.3d 488 (*LaPage*), a criminal case that is simply inapposite to the facts here. In *LaPage* the defendant was prosecuted and convicted for making false statements to a federally insured bank to obtain a loan. The Ninth Circuit reversed the conviction because the prosecutor had knowingly used false testimony from a key witness: “It is fundamentally unfair for a prosecutor to knowingly present perjury to the jury. . . . Because the use of known lies to get a conviction deprives a defendant of his constitutional right to due process of law, we must reverse [the defendant’s] conviction unless [the third-party witness’s] testimony was ‘harmless beyond a reasonable doubt.’” (*Id.* at p. 491, fn. omitted.) The court concluded, “No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this

⁴ Even if the unauthenticated document were actually Nadrous’s telephone bill and it in fact listed the cellular telephone number of Woldruff’s counsel, the nightclubs’ argument erroneously assumes Woldruff’s counsel would know whether Nadrous had attempted to call her. It is, of course, possible that Nadrous called Woldruff’s counsel on the telephone but never spoke to her.

⁵ The nightclubs also offer no authority for their assertion that, had Woldruff’s counsel stated out of the presence of the jury that Nadrous had called her, the trial court would have had a duty to inform the jury that Nadrous had lied on the stand.

pollution of the trial. . . . A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials.” (*Id.* at p. 492.)

Although the Ninth Circuit in dictum addressed the obligation of lawyers in civil actions not to use false testimony, *LaPage* involved a prosecutor's knowing use of false testimony to obtain the defendant's conviction. That is a far different situation from a civil dispute between private parties in which a third-party witness allegedly testified falsely on cross-examination when asked if he had ever telephoned plaintiff's counsel. *LaPage* emphasized the unique ethical obligation of prosecutors, who, as the court expressly stated, have “a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials.” (*LaPage, supra*, 231 F.3d at p. 642.) In further contrast to *LaPage*, Woldruff's counsel here did not present the allegedly objectionable testimony to the jury, nor did she make any attempt to use it to obtain a verdict against the nightclubs. Rather, the nightclubs simply failed to authenticate the document they wished to use to impeach Nadrous's testimony that he had never called Woldruff's counsel.

Other authority relied on by the nightclubs is similarly inapposite. Several of the cases they cite involve an attorney's duty to inform the court when his or her client makes false statements before the court (see, e.g., *Hinds v. State Bar of California* (1941) 19 Cal.2d 87, 93 [commenting that, had the attorney being disciplined known his client had made false statements in an affidavit, he would have been required to inform the court]), and in no way suggest that a party's counsel is required to help opposing counsel impeach the cross-examination testimony of a third-party witness. Other cases involve the obligation not to present knowingly false evidence. Thus, in *People v. Riel* (2000) 22 Cal.4th 1153, 1215-1218, the Supreme Court found an attorney had not provided ineffective assistance to a criminal defendant by failing to offer alleged newly-discovered evidence, some of which the attorney believed would be false. The principle behind that holding -- counsel cannot use testimony he or she knows to be false -- while certainly valid is simply irrelevant here, given that Woldruff's counsel did not elicit or use Nadrous's allegedly objectionable testimony to further the case against the nightclubs. In

sum, nothing in the cases cited by the nightclubs, or any other relevant case law, supports the assertion that the trial court erred by declining to require Woldruff's counsel to reveal out of the presence of the jury whether Nadrous had telephoned her.

DISPOSITION

The judgment as to Orange Valley Entertainment and Paradise Theatre is reversed. The judgment as to Amer El-Rousan, Stimson & Gale Entertainment, Sahara Theatre III and Chuck Jajieh is affirmed. Orange Valley Entertainment and Paradise Theatre are to bear their own costs on appeal. Woldruff is to recover her costs on appeal from the remaining defendants.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

ZELON, J.